town, Grinnell, Gustavus Adolphus, Hampden-Sidney, Hanover, Hastings, Hendrix, University of Illinois, Iowa State, University of Iowa, Johns Hopkins University, Lafayette, Lake Forest, Loyola University, McGill University, Newberry, University of New Brunswick, Pomona, Redfield, Roanoke, University of Rochester, St. John's (Md.), St. Lawrence University, University of the South, University of South Carolina, Union, University of Utah, Wesleyan University (Conn.), Wheaton, Wooster University, 1.

THE CONSTITUTIONALITY OF THE COMPULSORY ASEXUALIZATION OF CRIMINALS AND INSANE PERSONS. — On the theory that modern scientific investigation has demonstrated that idiocy, insanity, and criminality are hereditary, several states have recently passed statutes providing for the compulsory asexualization of the inmates of insane asylums and state prisons in cases where it seems advisable to a board of medical examiners.[1] The application of this provision to others besides criminals and the manner and purpose of its imposition make it clear that it should not be regarded as a punishment but as an exercise of the police power. This power certainly enables the state to take some measures to protect itself against the birth of undesirable citizens, since limitations on the right to marry have been upheld on this ground.[2] Furthermore, the fact that this purpose is achieved by performing an operation is not a fatal objection, for it is clear that a state can inflict physical injury on individuals for the protection of society. Compulsory vaccination laws, for instance, have been upheld,[3] and the operation of vasectomy, at least, is hardly more serious than vaccination.[4] If, therefore, there is a probability that the persons to be operated upon will produce insane or degenerate offspring, the statutes are constitutional. Since the insanity of lunatics is generally inherited,[5] the statutes, in so far as they apply to lunatics, would thus seem to be valid.[6]

With regard to criminals, however, the statutes are less easy to sustain. The researches of criminologists have demonstrated that a large

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[1] IND., LAWS, 1907, c. 215; CONN., PUB. ACTS, 1909, c. 209; CAL., STAT., 1909, c. 720; IA., LAWS, 1911, c. 129.

[2] Lonas *v.* State, 3 Heisk. (Tenn.) 287; State *v.* Gibson, 36 Ind. 389; Gould *v.* Gould, 78 Conn. 242, 61 Atl. 604.

[3] Morris *v.* Columbus, 102 Ga. 792, 30 S. E. 850; Jacobson *v.* Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358.

[4] See 27 MEDICO-LEGAL JOURNAL, 134. Vasectomy is a comparatively simple and painless operation consisting of the cutting into and binding up of a small portion of the vas deferens. It effectively sterilizes the subject but does not impair his health or take away his sexual instincts.

[5] See LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 168.

[6] The right of the state to confine insane persons in asylums is clearly established. Dowdell, petitioner, 169 Mass. 387, 389, 47 N. E. 1033, 1034. This right has sometimes been based on the state's authority to care for the helpless. See Dowdell, petitioner, *supra;* Chavannes *v.* Priestly, 80 Ia. 316, 320, 45 N. W. 766, 768. In some cases, however, it is certainly based also on the state's right to protect society. See Shenango *v.* Wayne, 34 Pa. St. 184, 186; Keleher *v.* Putnam, 60 N. H. 30, 31. Preventing the procreation of lunatics is merely another method of exercising this right of social protection.

number of criminals have an inborn and hereditary tendency to crime,[7] but such criminals probably form only a minority of the inmates of penal institutions.[8] Therefore mere conviction of crime is insufficient to justify society in taking this drastic means of protecting itself against the criminal. Asexualization can only be justified in the case of born criminals,[9] and unfortunately in the present state of scientific knowledge it seems impossible to distinguish most born criminals from criminals by acquired habit.[10] Therefore born criminals who cannot be proved to be such must be granted immunity. However, there are probably some criminals whose degenerate character can be ascertained, and if a statute can be so drawn as to limit its operation to such as these it should be constitutional.[11]

It is possible, however, for a legislature to change the aspect of the constitutional question by imposing sterilization as a punishment for crime.[12] As such it is not unconstitutional unless cruel and unusual. A recent case holds that vasectomy is not a cruel[13] punishment for statutory rape.[14] *State* v. *Feilen*, 126 Pac. 75 (Wash.). The scope of the provision against cruel punishment has never been clearly defined, but it certainly prohibits torture,[15] and, looked at apart from its purpose,

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[7] See FERRI, CRIMINAL SOCIOLOGY, 28; LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 151; DUGDALE, THE JUKES.

[8] Ferri estimates that born and habitual criminals together form about forty per cent of the total. See FERRI, CRIMINAL SOCIOLOGY, 18.

[9] The only objection which can be made to the legitimate children of habitual criminals is that they are likely to be reared in an atmosphere of crime. This is merely an inference, and if it proves correct the state can take them from the custody of their parents. See Van Walters *v.* Board of Children's Guardians, etc., 132 Ind. 567, 569, 32 N. E. 568, 569. The legislature clearly has no power to enact laws based on the principle that no one has a right to have children unless he can bring them up in an ideal environment.

[10] See SALEILLES, INDIVIDUALIZATION OF PUNISHMENT, 129.

[11] Inasmuch as it is very difficult to restrain the powers of the medical examiners within proper limits, the attempt to pass this sort of legislation at present seems inadvisable. The common provision that the operation may be performed whenever a majority of the examiners "decide that procreation would produce children with a tendency to disease" would seem to give dangerously wide powers to examiners who held extreme views as to the hereditary nature of crime; and yet it is hard to suggest a more satisfactory phraseology.

[12] Although the purpose of the statute is not to avenge or prevent a particular crime, but rather to reduce the number of criminals, it would seem that since it provides for sterilization as part of the sentence imposed upon conviction of crime it must be regarded as punishment. *Cf.* State *v.* Ray, 63 N. H. 406. See People *ex rel.* Bradley *v.* Illinois State Reformatory, 148 Ill. 413, 419, 36 N. E. 76, 78. *Contra*, Prescott *v.* State, 19 Oh. St. 184.

[13] The word "unusual" which is generally linked with "cruel" is not in the Washington constitution. WASH. CONST., Art. 1, § 14. Its omission is not important, since it is always construed with cruel. Storti *v.* Commonwealth, 178 Mass. 549, 60 N. E. 210.

[14] The precise crime of which the defendant was convicted was "the carnal abuse of a female person under the age of ten years." WASH., REM. & BAL. CODE, §§ 2287, 2436.

[15] See Wilkerson *v.* Utah, 99 U. S. 130, 136; State *v.* Williams, 77 Mo. 310, 312. Some courts hold that a punishment may also be cruel because excessive. State *v.* Driver, 78 N. C. 423; Weems *v.* United States, 217 U. S. 349, 30 Sup. Ct. 544. *Contra*, Aldridge *v.* Commonwealth, 2 Va. Cas. 447. Since rape may be punished by death, sterilization can hardly be regarded as an excessive penalty. Rayna *v.* State, 75 S. W. 25.

vasectomy is a mild form of torture. The fact that there is a rational purpose behind it makes it doubtful, however, if it can be said to shock public feeling, which has sometimes been laid down as the test of cruel punishment.[16] Yet, in the case of those convicted of some of the crimes included in the Washington statute, the act authorizes the asexualization of persons against whom society is not in need of this protection.[17] As to them the punishment seems cruel, and the statute which imposes it unconstitutional. At all events, it is thoroughly objectionable, since it imposes as a penalty for certain classes of crime a treatment which is justified, if at all, only by the physical nature of certain criminals.

EFFECT OF RECEIVERSHIP OF LESSEE RAILROAD ON THE LEASE. — It frequently happens in this country that one public service company with legislative permission leases all of its property to a new company which assumes its debts and obligations, the lessor remaining in existence but no longer actively engaging in business. A peculiar situation arises in such a case when the lessee railroad or street railway goes into the hands of a receiver.[1] A reasonable time to determine the desirability of continuing a lease is granted to a receiver as essential to the proper performance of his functions.[2] And since he cannot split up the lease, his decision relates back to his appointment. If he reject the lease, the lessor has a provable claim against the estate for the stipulated rental accruing during the trial period.[3] Or the lessor may, at his option, charge the receiver with the reasonable rental value of the property for that time upon quasi-contractual principles.[4] This must mean that the lessor

[16] See COOLEY, CONSTITUTIONAL LIMITATIONS, 473; State *v.* Becker, 3 S. D. 29, 41. Furthermore, the apparent theory of the statute that the crime of which the defendant was convicted is strong evidence of his degenerate character seems reasonable, although it has been asserted that such crimes are mainly due to the effect of civilization. See LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 256.

[17] The act authorizes the sterilization of habitual criminals. WASH., REM. & BAL. CODE, § 2287. Habitual criminals include those who have been three times convicted of petit larceny. WASH. REM. & BAL. CODE, § 2286. Larceny is common among born criminals. See LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 154. Nevertheless, the fact that a man has been found guilty of three small thefts is insufficient evidence of his degeneracy. This objection is hardly lessened by the fact that the sterilization of such persons is discretionary with the court, since this discretion may be exercised arbitrarily.

[1] It is now settled that courts of equity may appoint receivers to administer the affairs of insolvent public service corporations in the absence of objection by the corporation, although it may amount to corporate dissolution without the aid of statute. Horn *v.* Pere Marquette R. Co., 151 Fed. 626; *Re* Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219.

[2] Platt *v.* Philadelphia & Reading R. Co., 84 Fed. 535; Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961; Quincy, Missouri & Pacific R. Co. *v.* Humphreys, 145 U. S. 82, 12 Sup. Ct. 787. It is only necessary for most of the decisions, however, to hold that possession for a reasonable time by the receiver is not an adoption of the lease.

[3] Pennsylvania Steel Co. *v.* New York City Ry. Co., "The Second Avenue Bondholders' Appeal," C. C. A., Second Circ., 1912.

[4] Stoepel *v.* Union Trust Co., 121 Mich. 281, 80 N. W. 13; Carswell *v.* Farmers' Loan & Trust Co., 74 Fed. 88; St. Joseph and St. L. R. Co. *v.* Humphreys, 145 U. S. 105, 12 Sup. Ct. 795. In some jurisdictions the receiver may be held for the stipulated rental during his occupancy. Nelson *v.* Kalkhoff, 60 Minn. 305, 62 N. W. 335; Charlotte, C. & A. R. Co. *v.* Chester & L. N. G. R. Co., 118 N. C. 1078, 24 S. E. 769.